UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CANTOR FITZGERALD, LP

and Case 28–CA–195506

PATRICK THURMAN, an Individual

Nestor M. Zárate Mancilla, Esq.,
for the General Counsel.
Derek G. Barella, Esq. (Winston & Strawn, LLP), and Nirav S. Shah, Esq.,
for the Respondent.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. The amended complaint in this case challenges several rules or provisions in the employee handbook maintained by Cantor Fitzgerald, LP and its affiliated entities. The rules or provisions address various matters, including responding to requests for information, cooperating in investigations and litigation, personal appearance, and confidentiality of the handbook itself. The amended complaint alleges that Cantor violated Section 8(a)(1) of the National Labor Relations Act by maintaining these handbook rules or provisions, and by making them available to its affiliates, which maintained and applied them, because the rules or provisions impede employees from engaging in various activities protected by the Act.[1]

Cantor denies that it violated the Act. It contends that the Board does not even have jurisdiction over it because it has no employees and is not properly named as a party in this proceeding. It further contends that the challenged rules or provisions are entirely lawful because they either have no impact on activities protected by the Act or any arguable impact is negligible and substantially outweighed by the business justifications for the rules or provisions.[2]

The hearing was held on June 20, 2018, in Phoenix, Arizona.[3] The General Counsel and Cantor thereafter filed briefs on July 25. For the reasons set forth below, the amended complaint is dismissed for lack of jurisdiction. There is therefore no basis or reason to reach the merits of the complaint allegations.

---

[1] The original complaint issued on August 31, 2017 (GC Exh. 2(e)), and was amended on March 6, 2018 (GC Exh. 2(j)), and again at the June 20 hearing (GC Exh. 2(r); Tr. 8).

[2] Cantor asserted essentially the same positions in all three of the answers it filed to the original complaint and subsequent amendments on September 14, 2017 (GC Exh. 2(g)), March 20, 2018 (GC Exh. 2(n)) and July 5, 2018 (GC Exh. 6).

[3] Only one witness testified: Lindsey Sherman, director of human resources for Newmark Knight Frank, a subsidiary of BGC Partners, Inc., which as discussed infra is affiliated with Cantor, which owns a controlling percentage of its outstanding voting shares. Cantor stipulated that Sherman is its agent (Tr. 9–10).

I. FACTUAL BACKGROUND

Cantor is a limited partnership with an office and place of business in New York, New York. As indicated above, Cantor asserts that it does not have any statutory employees, and there is no allegation or evidence otherwise. However, it is affiliated with nine other entities with offices around the country that do. Most of these nine affiliates provide financial services, including securities brokerage or trading, and investment banking. However, one of the affiliates, Delivery.com LLC, delivers meals and groceries.[4] Cantor also owns a controlling percentage of the outstanding voting shares of BGC Partners, Inc., a publicly traded holding company with numerous subsidiaries across the country that provide financial or commercial real estate services, including Newmark Knight Frank (NKF). See the similar decision issued this same day in *BGC partners, Inc*., 28–CA–195500.

The Cantor employee handbook was jointly created by the human resources (HR) departments of Cantor, BGC, and NKF in 2014, and has been made available to and applied at all nine of the Cantor affiliates since.[5] It sets forth numerous rules divided into eight sections: Introduction (100), Equal Employment Opportunity (200), Ethics and Compliance Policies (300), Employment and Personnel Records (400), Work Hours & Compensation (500), Benefits and Leave (600), Security and Protection of Assets (700), and General Guidelines (800).

The General Counsel challenges four of the rules: Requests for Employee Information (403), Press Inquiries and Other Information Requests (804), Cooperating in Investigations and Litigation (805), and Personal Appearance (811). The General Counsel also challenges a confidentiality statement that appears at the bottom of each page of the handbook. The General Counsel contends that each of these rules or provisions is unlawfully overbroad and coercive under the analytical framework set forth in *Boeing Co*., 365 NLRB No. 154 (2017).

II. JURISDICTION

As indicated above, Cantor denied in its answers to both the original August 31, 2017 complaint and the March 6, 2018 amended complaint that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. In addition, it affirmatively asserted that the Board lacks jurisdiction over it because, inter alia, it has no employees. Apparently for this reason, the General Counsel again amended the complaint at the beginning of the June 20 hearing to delete the jurisdictional allegations regarding Cantor and substitute jurisdictional allegations regarding its nine affiliates.

The General Counsel and Cantor at that time also submitted certain related stipulations they had entered into "for the sake of efficiency." The stipulations stated that each of the nine

[4] Jt. Exh. 2; Tr. 35–36, 38, 74. The parties stipulated that the nine Cantor affiliates that employ at least one non-managerial employee are: Helix Financial Systems LP; Fintan Partners, LLC; Cantor Real Estate LP; Cantor Futures Exchange LP; Cantor Fitzgerald Investment Advisors, LP; Cantor Sponsor, L.P.; Delivery.com LLC; Cantor Fitzgerald Securities; and Cantor Fitzgerald & Co. (Jt. Exh. 2, Table A.)

[5] Tr. 36–38, 59–60; Jt. Exh. 2, par. 3.

affiliates has at least one non-managerial employee, is an employer within the meaning of the Act, and applies the handbook rules to its employees; that each of the affiliates waives the filing and service of the charge and the opportunity to file an answer or present evidence in defense of the complaint allegations; and that Cantor "has authority to require," and "will require" the affiliates "to take all necessary actions to comply with any remedial order or relief that may issue" in this case. In its July 5 posthearing answer to the June 20 amended complaint, Cantor also specifically admitted that each of the affiliates performs services valued in excess of $50,000 in more than one state and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. See Jt. Exh. 2, and GC Exhs. 2(r) and 6.

The foregoing stipulations and admissions appear sufficient to establish jurisdiction over the nine affiliates. However, the nine affiliates are not named or alleged respondents. The General Counsel never amended the complaint to name them as respondents or allege that they violated the Act by maintaining and applying the rules and provisions. As indicated above, the amended complaint continues to allege only that Cantor violated the Act by maintaining the rules or provisions and making them available to its nine affiliates, which applied them to their employees.

Thus, the threshold issue in this case is whether the Board has jurisdiction over Cantor, i.e., whether Cantor is a Section 2(2) "employer" subject to the Act's prohibitions against interfering with, restraining, or coercing employees in the exercise of their protected rights to engage in union or concerted activities for the purpose of improving their wages, hours, or other terms and conditions of employment. As with other elements of the prima facie case, the burden is on the General Counsel to establish that Cantor is such an employer. See *Laborers Local 1177 (Qualicare-Walsh, Inc.)*, 269 NLRB 746 (1984).

The General Counsel has failed to do so. Under extant Board precedent, an "employer" under the Act is one that employs statutory employees. See *Operating Engineers Local 487 Health and Welfare Trust Fund*, 308 NLRB 805 (1992) (dismissing the complaint because the General Counsel had not shown that the Fund, the only named respondent, employed any such employees). The General Counsel has never offered any reason to distinguish or disregard this precedent. Indeed, the General Counsel's posthearing brief does not even address the jurisdictional issue.[6]

Arguably, Cantor's above-described stipulations—that it participated in creating the handbook and provided it to the affiliates; that it has the authority to require the affiliates to

[6] There is also a question whether Cantor satisfies the Board's interstate commerce standards for asserting jurisdiction. As indicated above, the amended complaint alleges, and Cantor admits, that the nine affiliates satisfy those standards. However, the amended complaint does not allege, and the General Counsel does not argue, that Cantor and each of the nine affiliates are a single employer or that there is any other recognized legal basis to combine their operations for purposes of determining Cantor's interstate commerce. Nor does the amended complaint allege that Cantor is independently engaged in sufficient interstate commerce. In any event, it is unnecessary to reach the issue given that the General Counsel has failed to establish that Cantor is an employer within the meaning of the Act.

rescind the handbook rules or provisions; and that the affiliates waive whatever due process rights they may have in this proceeding—are sufficient to establish that Cantor is an agent of the affiliates, at least with respect to the handbook rules or provisions. Section 2(2) of the Act states that the term "employer" may include "any person acting as an agent of an employer, directly or indirectly." And Section 2(1) of the Act states that the term "person" may include "corporations." However, the amended complaint does not allege, and the General Counsel has never argued, that Cantor is such an agent. See id. at 809 n. 7 (refusing to consider any such agency theories where the General Counsel neither alleged nor argued the theories before the administrative law judge).

Further, the record as a whole indicates that Cantor's stipulations had a remedial rather than a jurisdictional purpose. That is, they were intended, not to implicitly or effectively stipulate that Cantor is a 2(2) agent of its affiliates, but to stipulate that Cantor "would require [its] affiliates to comply with any order issued" by the Board (Tr. 16); that Cantor "will ensure that any affiliate entities where these rules are in place, that the remedy runs to those affiliates and they comply with it" (Tr. 17). Compare *UPMC*, 362 NLRB No. 191, slip op. at 1 n. 2, and 7, and JD at 26–27 (2015), which likewise involved alleged unlawful rules or policies, where the Board's order included a provision requiring certain remedial actions, not only by the two named respondent UPMC subsidiaries, but also by UPMC itself, even though it was not a named respondent, because UPMC had executed a pretrial stipulation that it would expunge any policies found to be unlawful wherever they existed on a system-wide basis at any and all of its facilities and notify all employees at those facilities that the policies have been rescinded.

Accordingly, as the General Counsel has failed to establish jurisdiction over Cantor, the amended complaint allegations against it must be dismissed.

ORDER[7]

The amended complaint is dismissed.

Dated, Washington, D.C., September 7, 2018

Jeffrey D. Wedekind
Administrative Law Judge

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.